85-2083

No. _____

Supreme Court, U.S.
FILED
MAY 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES M. JUDGE,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
and its agencies as their interests may appear,

Respondent.

JURISDICTIONAL STATEMENT OR IN THE ALTERNATIVE PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ACCOMACK COUNTY, VIRGINIA

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

1. Whether a State Legislature violates the due process mandated by the Fourteenth Amendment to the United States Constitution when it repeals a statute passed for the benefit of a named individual without providing actual notice and a reasonable opportunity to be heard to the person whose rights are being taken away by the repeal.

PARTIES

The defendant-appellant below was an individual, James M. Judge. The plaintiff-appellee was the Commonwealth of Virginia, *et al.* and its agencies as their interests may appear, who are the Board of Supervisors of Accomack County, Virginia; Jon C. Poulson, County Attorney; Graham Nock (Knott), Commissioner of Revenue, Accomack County, Virginia; Martha B. Hundley, Treasurer, Accomack County, Virginia; and Donald Haynes, State Librarian, Commonwealth of Virginia.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR NOTING PROBABLE JURISDICTION OR FOR GRANTING THE WRIT	5
1. Petitioner was entitled to actual notice and opportunity to be heard before the Statute was repealed	5
CONCLUSION	13
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Board of Regents v. Roth, 408 U.S. 564 (1972) 7
Boddie v. Connecticut, 401 U.S. 371 (1971) 7
Ex Parte, Commonwealth of Virginia, 100 U.S. 676 (1880) 5
Fuentes v. Shevin, 407 U.S. 67 (1972) 7, 8
Levasser v. Washburn, 11 Gratt (52 Va.) 572 (1854) 6
Londoner v. Denver, 210 U.S. 373 (1908) 12
Michigan Land and Lumber Co. v. Rust, 168 U.S. 589 (1897) 9
Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) 10
O'Bannon v. Town Court Nursing, 447 U.S. 773 (1980) 11
Powell v. Fields, 155 Va. 612, 155 S.E. 819 (1930) .. 8, 9
Robinson v. Hanrahan, 409 U.S. 38 (1972) 10
Schroeder v. City of New York, 371 U.S. 208 (1962) 10
Walker v. Hutchinson, 352 U.S. 112 (1956) 11

Constitution and statutes:

Chapter 18, Acts of Assembly, Commonwealth of Virginia, approved December 12, 1964 .....*passim*
Chapter 510, Acts of Assembly, Commonwealth of Virginia, approved March 31, 1964 .....*passim*
Code of Virginia, 1950, Section 8.01-231 6
Fourteenth Amendment .....*passim*

Miscellaneous:

Black's Law Dictionary 9

IN THE

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No. ———

JAMES M. JUDGE,

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v.

COMMONWEALTH OF VIRGINIA, *et al.*,
and its agencies as their interests may appear,

Respondent.

JURISDICTIONAL STATEMENT OR IN THE ALTERNATIVE PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF ACCOMACK COUNTY, VIRGINIA

Appellant/Petitioner James M. Judge respectfully appeals from, or, in the alternative, prays that a Writ of Certiorari issue to review, the judgment and opinion of the Virginia Supreme Court entered in this case.

OPINIONS BELOW

The opinion of the Virginia Supreme Court is unreported and appears at Appendix ("App.") 1a. The Order of the Virginia Supreme Court staying entry of the Mandate is unreported and appears at App. 2a. The opinion and judgment order of the Circuit Court of Accomack County granting final judgment to Respondent is unreported and appears at App. 3a. The opinion and order of the Circuit Court of Accomack County granting Summary Judgment against Appellant's/Petitioner's

United States Constitutional claims is unreported and appears at App. 6a.

JURISDICTION

The judgment of the Virginia Supreme Court was entered on March 3, 1986. Notices of appeal were filed with the Supreme Court of Virginia and the Circuit Court of Accomack County, Virginia on May 30, 1986 and are reprinted at App. 16a, 18a. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2) and (3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States is reprinted at App. 22a. Chapter 510, Acts of Assembly, Commonwealth of Virginia, approved March 31, 1964, an Act for the relief of Freida V. Judge and James M. Judge, is reprinted at App. 20a. Chapter 18, Acts of Assembly, Commonwealth of Virginia, approved December 12, 1964, an Act to repeal Chapter 510 Acts of Assembly of 1964, being an Act for the relief of Freida V. Judge and James M. Judge is reprinted at App. 21a.

STATEMENT OF THE CASE

On May 23, 1985, Appellant/Petitioner James M. Judge (hereinafter "Judge") lost the land that his family had purchased over fifty years ago, improved with buildings, lived on, operated their business from and paid real estate taxes on. Judge is aggrieved by an Order entered in the Circuit Court of Accomack County denying his United States Constitutional claims and the decision of the Virginia Supreme Court finding no reversible error and denying his Petition for Appeal entered on March 3, 1986.

Judge's predecessors in title—his father, Harry Judge and his mother, Freida V. Judge—acquired the land

through deeds as early as 1935. These deeds were not recorded. Judge's father and mother built several buildings on the property and operated their business from it. Their home was on the property. They were assessed and paid real property taxes to Accomack County. In 1962, when the property was severely damaged by a storm, they applied for a Federal Disaster Relief Loan and for the first time discovered that they did not hold complete legal title. They discovered that record title was in the Commonwealth of Virginia.

The Virginia Legislature responded to their plight, and Chapter 510 was passed on March 31, 1964, relinquishing the Commonwealth's interest in the land to Freida V. Judge and James M. Judge.[1] Chapter 510 acknowledged the Judges' interest in, and their long-standing possession of, the land and authorized and directed the State Librarian to issue a "quit claim" deed to them. Chapter 510 was titled, "An Act for the relief of Freida V. Judge and James M. Judge". After Chapter 510 attained complete legal status as a law of the Commonwealth of Virginia, but before issuance of the "quit claim" deed by the State Librarian and without notice to Judge, the Virginia Legislature passed Chapter 18 in a special session on December 12, 1964. Chapter 18 was titled, "An Act to repeal Chapter 510 of the Acts of Assembly of 1964, being an act for the relief of Freida V. Judge and James M. Judge."

Judge continued in possession of the property and was assessed and paid real estate taxes to Accomack County until 1982, when the Accomack County Attorney ordered his name stricken from the tax rolls. When this occurred, he retained an attorney and filed suit in the

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[1] Harry Judge having died, all of his interest was conveyed by his heirs at law to Appellant/Petitioner James M. Judge. Freida V. Judge is also now deceased, and all of her interest has been conveyed by her heirs at law to Appellant/Petitioner.

United States District Court, for the Eastern District of Virginia on July 25, 1983. The suit alleged that passage of Chapter 18 by the Virginia Legislature without notice to Judge, after passage of Chapter 510, constituted a taking without compensation and a denial of due process in violation of the United States Constitution. After Judge filed his Complaint in the United States District Court, the Commonwealth of Virginia filed a Bill to Quiet Title in the Circuit Court of Accomack County and moved the District Court for entry of an order staying Judge's federal suit. An order granting the stay was entered by the District Court on October 4, 1983.

Judge filed his Answer and Grounds of Defense to the Commonwealth's Bill to Quiet Title and filed a Cross Bill in the Circuit Court of Accomack County alleging the unconstitutionality of Chapter 18. Cross Motions for Summary Judgment were filed with respect to the constitutional claim. The Circuit Court denied Judge's Motion for Summary Judgment as to his constitutional claims, and the Summary Judgment Motion of the Commonwealth was granted. The Trial Court held that no property rights had vested in Judge as a result of the passage of Chapter 510, and, therefore, the passage of Chapter 18 prior to issuance of the "quit claim" deed by the State Librarian precluded him from recovery on any of his claims for relief based upon the United States Constitution. The Trial Court agreed with the Commonwealth's position that no notice to the Judges of the repeal of Chapter 18 was required beyond the filing of the bill in the legislature.

Trial was held on May 9, 1985, and a Final Order granting the Commonwealth's Bill to Quiet Title was entered on May 23, 1985. Timely Notice of Appeal was filed by Judge on June 3, 1985. Judge asserted on appeal to the Virginia Supreme Court that the Trial Court erred in denying his constitutional claims in violation

of the rights and privileges granted to him by the United States Constitution and that the passage of the repealing statute, Chapter 18, without actual notice to him violated constitutionally mandated "due process" and was therefore void.[2] The Virginia Supreme Court, by its Order entered on March 3, 1986, held that there was no reversible error and refused the Petition for Appeal. The United States District Court, by Order entered on January 7, 1986, dismissed the federal suit.

REASONS FOR NOTING PROBABLE JURISDICTION OR FOR GRANTING THE WRIT

Notwithstanding this Court's prior decisions requiring actual notice when the identity of a party having a legally protected interest is known or easily ascertainable in a proceeding which is to be accorded finality, both the Virginia Legislature and the Virginia courts have disregarded that principle in the instant case. This Court should reaffirm this important constitutional principle and remind state legislatures that due process applicable to the States through the Fourteenth Amendment requires a higher degree of notice when the legislature seeks to repeal legislation passed for the benefit of named individuals.

I. Petitioner was entitled to actual notice before the Statute was repealed.

The Fourteenth Amendment applies to the Legislature of the Commonwealth of Virginia and all State Legislatures. In *Ex Parte, Commonwealth of Virginia*, 100 U.S. 676 (1880) this Court made it clear that the Fourteenth

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[2] The Fourteenth Amendment issue raised herein was fully briefed and argued to the Virginia Supreme Court and preserved for consideration by this Court. *James M. Judge, Appellant v. Commonwealth of Virginia, et al. and its agencies as their interest may appear, Appellee,* Virginia Supreme Court, Record No. 850657, Petition for Appeal.

Amendment imposes restrictions on state power and applies to the legislative, executive and judicial bodies.[3] The repealing Act, Chapter 18, was void ab initio, as being contrary to the constitutional guarantee of due process because Judge was not given notice reasonable under the circumstances or opportunity to be heard prior to its passage. Chapter 510 acknowledged Judge's existing possessory and equitable interests and relinquished the Commonwealth's interest to Judge. The Commonwealth's relinquishment of its interests to Judge could not be repealed without first providing notice reasonable under the circumstances and an opportunity to be heard. Chapter 510 specifically acknowledged and recited the mesne conveyances, that the land was held by the Judges and that Judge's family had paid taxes and held the land to the exclusion of all others for more than twenty years. Chapter 510 also stated that "there is no one but the Commonwealth of Virginia, except the said Judges who could have any interest in the said land." Abandonment of the Commonwealth's interest in the land upon the passage of Chapter 510 had significant legal ramifications for Judge. Code of Virginia, 1950, § 8.01-231 provides that the Statute of Limitations does not bar the Commonwealth and adverse possession is not available against the Commonwealth. *Levassar v. Washburn*, 11 Gratt (52 Va.) 572 (1854).

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[3] We have said the prohibitions of the 14th Amendment are addressed to the States. They are: "No *State* shall make or enforce a law which shall abridge the privilege or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the law." They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of its officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws.

A fundamental difficulty with the Trial Court's analysis of the due process issue is its belief that only full legal title requires due process and its failure to recognize that Chapter 510 recited pre-existing constitutionally protected interests. (Trial Transcript p. 5; hereinafter "Tr.") This Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), held that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money". Also, in *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court held that the Fourteenth Amendment's, protection of "property" has never been interpreted to safeguard only the rights of undisputed property ownership. Rather, it has been read broadly to extend protection to "any significant property interests". In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Court held that a state replevin law was unconstitutional as violating the Fourteenth Amendment's requirement of due process because even one having a disputed possessory interest fell within the protection of that Amendment.[4]

Judge's possessory and equitable interest in the property is clear. It was acknowledged by the Virginia Legislature in Chapter 510 as existing for more than twenty years. It is clearly stated in Chapter 510 that "this family has held the whole of said property to the exclusion of any other claimant thereto for more than twenty years". As is evidenced by the Bill of Complaint to Quiet Title, the Commonwealth sought to challenge Judge's possessory and equitable claims. If the Commonwealth at the time of filing this suit did not recog-

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[4] The replevin was not cast as a final judgment; most, if not all, of the appellants lacked full title to the chattels; and *their claim even to continue possession was a matter in dispute* . . . nonetheless, it is clear that the appellants were deprived of *possessory interests* in those chattels that were within the protection of the Fourteenth Amendment. 401 U.S. at 84 (emphasis supplied).

nize Judge's longstanding claims, it could have merely filed an Action in Ejectment.

However, as pointed out by this Court in *Fuentes, supra*, that the possessory interest is in dispute does not diminish the constitutional protection. Accordingly, the Trial Court and Virginia Supreme Court failed to recognize that a State may not dispense with due process merely because the person in possession of the property has something less than full legal title, or that the title is in dispute. If as in this case a possessory interest exists, due process is required.

The Trial Court relied primarily upon the rationale of *Powell v. Fields*, 155 Va. 612, 155 S.E. 819 (1930), in holding that due process was not required in that no rights had vested in Judge as a result of the passage of Chapter 510. They both failed to recognize that Judge's constitutionally protected possessory interest existed before the passage of Chapter 510, and this statute simply acknowledged the existence of a protected possessory interest. Would this Court ever hold that if Chapter 510 had acknowledged the possessory interest of Judge and then, without actual notice, proceeded to declared all title to the land to be in the Commonwealth, the statute would survive a constitutional challenge? Though we believe that the Trial Court's reliance upon *Powell, supra*, was misplaced, even in that case, the court recognized that during the period pending the issuance of the deed, a claimant who has met all the conditions of the Act is vested with an equitable interest.[5]

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[5] . . . [I]t is frankly and rightly conceded to be well settled that a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the Government and that his rights to a legal title is to be determined as of that time; and also that this rule is based upon the theory that by virtue of his compliance with the requirements he has an *equitable title to the land*; that in equity it is his and the Government holds it in trust for him. [*Powell*, 155 Va. at 622 (emphasis supplied)].

The claimant in *Powell* was unsuccessful because he did not complete all that was required of him under the Act. In contrast, Judge had no requirements imposed upon him under Chapter 510. Accordingly, he was vested with an equitable interest which the Commonwealth held in trust for him. It is important to note that Chapter 510 acknowledged Judge's interest in the land and that no other person had an interest except the Commonwealth of Virginia. The Commonwealth relinquished its title by Chapter 510 and directed the State Librarian to issue a "quit claim" deed, which is a deed that does not grant but relinquishes one's interest.[6] The interest of Judge was acknowledged to exist, and the legislature required nothing further of him. The Commonwealth relinquished its interest upon passage of Chapter 510. That the State Librarian had not issued the "quit claim" deed before passage of the repealing statute is of no importance, since its issuance would not have been a grant of land. Even if the "quit claim" deed is construed as a grant of conveyance, the required result remains the same.

In *Michigan Land and Lumber Co. v. Rust*, 168 U.S. 589 (1897), a case involving a land grant act similar to the one in *Powell*, this Court characterized the interests of a claimant awaiting the issuance of a patent as being an equitable title, with the Government holding legal title until the patent was actually issued. The Court made clear that a claimant's interest could not be taken without due process while awaiting the issuance of a patent.[7]

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[6] "QUITCLAIM v. In conveyancing. To release or relinquish a claim; to execute a deed of quitclaim." *Black's Law Dictionary*, Fourth Edition, p. 1417.

[7] It is, of course, not pretended that where an equitable title has passed, the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, *after proper notice to the party claiming such equitable title, and upon a hearing*, to determine the question of whether or not such title has passed. [168 U.S. at 590 (emphasis supplied)].

In applying the above analysis to the instant case, it is clear that Judge not only held a protected possessory and equitable interest prior to the passage of Chapter 510, but was vested with a "quit claim" interest upon the passage of Chapter 510 sufficient to require due process before the Commonwealth could act to take away that interest with the passage of Chapter 18.

The notice given to Judge by the Commonwealth prior to the passage of Chapter 18 was not sufficient to meet the Constitution's due process required by this Court. The record shows that the only notice provided to him by the Commonwealth concerning the enactment of Chapter 18 was the filing of the bill in the General Assembly. Tr. 5. The Commonwealth takes the position that this was the only notice required. The issue then, is whether or not the mere filing of the bill in the General Assembly was sufficient to meet the Constitutional requirements of due process under the specific facts of this case. We submit that it was not.

This Court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), set out the requirements of due process to be followed in each case.[8] In the instant case, *notice reasonably calculated under all the circumstances* to appraise Judge of the pending enactment of Chapter 18 as required by *Mullane* would have been actual notice. It is well settled that when an individual's name and address are known or easily ascertainable, nothing less than actual notice will suffice. *Mullane, supra*; *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Robinson v. Hanrahan*, 409 U.S. 38 (1972) (notice advising of vehicle forfeiture mailed to Robinson's home was inadequate when he was incarcerated for

[8] That an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections. [339 U.S. 306 (1950)].

the offense which lead to the forfeiture); *Walker v. Hutchinson*, 352 U.S. 112 (1956) (newspaper publication when Walker's address was listed on the tax rolls was inadequate). The facts in this case establish that it would have been a simple matter for the Commonwealth to give Judge actual notice, either by mail or personal service, since his whereabouts were known. He was specifically named in both Chapter 510 and Chapter 18. He was on the county tax rolls and recently resided on the property which was the subject matter of Chapter 510.

The Commonwealth's argument that there was no legal requirement to give personal or actual notice to Judge (Trial Transcript p. 5), and that due process requirements were met by the filing of the bill in the General Assembly, which is public notice to all citizens of the State, disregards the due process standards established by the Court. The policy considerations of the due process required were addressed in a concurring opinion by Justice Blackmun in *O'Bannon v. Town Court Nursing*, 447 U.S. 773 (1980).[9]

Where an Act under consideration by the legislature is one that will affect the public in general or segments of the public, the filing of a bill in the General Assembly may constitute public notice to all the citizens of the state and satisfy the due process required. However, Chapter 18 was an act effecting solely the rights of

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[9] The case for due process protection grows stronger as the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decision maker's purview. *For when government acts in a way that singles out identifiable individuals—in a way that is likely to be premised on suppositions about specific persons—it activates the special concern about being personally talked to about the decision rather than simply being dealt with.* 447 U.S. at 801 (Emphasis supplied).

Judge. As such, it was quasi adjudicatory in nature and therefore required reasonable notice, which in this case, given all the circumstances, was actual notice to him. *Londoner v. Denver*, 210 U.S. 373 (1908).

The implications of the State Court's decision below are far-reaching and have the potential to affect the legislatures of all states and the constitutional rights of many citizens. Research reveals that in the last five years, the Virginia General Assembly has passed on the average sixteen bills per year that affect the rights of identifiable individuals or organizations.[10] Assuming that the other forty-nine state legislatures follow the Virginia average, there are nationally approximately eight hundred such statutes passed every year by state legislatures.[11] This number demonstrates that the issue of what notice is required when a State enacts a statute affecting the rights of identifiable individuals or organizations has implications beyond those present in this case. The potential for abuse and the requirement of due process for passage, as well as repeal, make this issue worthy of this Court's attention.

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[10] There were eighty-one bills passed in Virginia from 1981 to the present which affected the rights of identifiable individuals or organizations. This figure includes bills passed for the relief of individuals, bills passed conveying property interests to individuals and organizations in State-owned property and bills passed granting tax exemptions to various organizations.

[11] The eight hundred figure is, of course, only an approximation. Virginia in 1985 had a population of 5,346,797, which is only slightly above the average state population of 4,744,000. The eight hundred figure assumes that the other forty-nine state legislatures are as responsive to their citizens as Virginia. Obviously, some states on the average will pass more bills directed at identifiable citizens and organizations, and others will pass less.

CONCLUSION

For the reasons outlined above, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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(703) 491-4136

* Counsel of Record

APPENDIX

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 3rd day of March, 1986.

Record No. 850657
Circuit Court No. CH 7988

JAMES M. JUDGE,
Appellant,

against

COMMONWEALTH OF VIRGINIA, *et al.*,
Appellees.

From the Circuit Court of Accomack County

[Filed Mar. 3, 1986]

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:

DAVID B. BEACH
Clerk

By: /s/ Deira A. Roman
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 7th day of April, 1986.

Record No. 850657
Circuit Court No. CH 7988

JAMES M. JUDGE,
Appellant,

against

COMMONWEALTH OF VIRGINIA, *et al.*,
Appellees.

Order Deferring Issuance of Mandate

Upon consideration of the motion of the appellant, by counsel, it is ordered that issuance of the mandate in this case be deferred until the 1st day of June, 1986, on the expiration of which time the mandate may be issued, unless by that time the case is docketed in the Supreme Court of the United States, in which event issuance of the mandate shall be deferred until the final determination of the case by that Court.

A Copy,
Teste:

/s/ David B. Beach
Clerk

VIRGINIA:

CIRCUIT COURT FOR THE COUNTY OF ACCOMACK,
ON THURSDAY, THE 23RD DAY OF MAY,
IN THE YEAR OF OUR LORD,
NINETEEN HUNDRED AND EIGHTY FIVE

Chancery No. 7988

COMMONWEALTH OF VIRGINIA and its Agencies
as Their Interests May Appear,
Complainants

v.

JAMES M. JUDGE,
Respondent

[Filed May 23, 1986]

FINAL DECREE

This cause came to be heard again on the 9th day of May, 1985 upon the papers formerly read; upon the evidence adduced on behalf of the complainant on the bill to quiet title; upon the evidence of the defendant as to said bill; and was argued by counsel.

UPON CONSIDERATION, the Court being of the opinion from the evidence that the Commonwealth of Virginia is the fee simple owner of the following-described real estate, the subject of this suit, to wit:

> All that certain lot or parcel of land situate in Atlantic Magisterial District, Accomack County, Virginia, along the South side of the public highway known as the "Causeway" leading from the mainland to Chincoteague Island, containing One and one-

half acres (1½ A.), more or less, and bounded on the North by the said "Causeway"; on the East by Queen Sound Channel; and on the South and West by Shell Bay.

and that the respondent James M. Judge has no valid claim or interest or title to said real estate, legal or equitable, it is accordingly

ADJUDGED, ORDERED and DECREED that title to said real estate be and hereby is quieted in the Commonwealth of Virginia, and that the Commonwealth of Virginia is the fee simple owner of said real estate; and it is further

ORDERED that pursuant to Rule 5:9 that the transcript of the hearing in this cause became a part of the record when filed pursuant to said Rule; and it is further

ORDERED that the Clerk certify copies of this Order to counsel of record.

And it appearing that nothing further remains to be done in this cause, it is further ORDERED that same be removed from the docket of this Court, and that the papers in this suit be placed amongst the ended causes, properly indexed.

Enter this Final Decree this 23 day of May, 1985.

/s/ N. Wescott Jacob
Judge

I ask for this:

/s/ Jon C. Poulson
Counsel for Complainant

Seen:

/s/ John Morris, III
Counsel for Commonwealth of Virginia
and Donald Haynes, State Librarian

/s/ Daniel Hartnett
Counsel for Board of Supervisors of
Accomack County, Virginia, Graham
Nock, Commissioner of Revenue, and
Martha B. Hundley, Treasurer

Seen and objected to:

/s/ Richard R. Nageotte
Counsel for Respondent

A Copy—
Teste: SAMUEL H. COOPER, JR., Clerk

by /s/ Iris Underwood, Dy.

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF ACCOMACK

Chancery No. 7988

COMMONWEALTH OF VIRGINIA, and its agencies, as their interests may appear,
Complainant

v.

JAMES M. JUDGE, *et als.*,
Respondents

JAMES M. JUDGE,
Cross-Complainant

v.

COMMONWEALTH OF VIRGINIA, *et als.*,
Cross-Defendants

[Filed May 9, 1986]

DECREE

This cause, which has been regularly matured, set for hearing and docketed, came on the 11th day of December, 1984, to be heard, upon the complainant's bill to quiet title and the exhibits filed therewith; the answer and grounds of defense of the respondent James M. Judge and the exhibit filed therewith; the cross-bill of complaint against the Commonwealth of Virginia and the exhibits filed therewith; the cross-bill of complaint filed with leave

of Court against the Commonwealth of Virginia and the other cross-defendants named therein; the motion for summary judgment by the respondent and cross-complainant James M. Judge; the order dismissing all respondents to the bill to quiet title other than the said James M. Judge; the answer of the cross-defendants Commonwealth of Virginia and Donald Haynes, State Librarian; the answer of the cross-defendants Board of Supervisors of Accomack County, Virginia, Jon (John) C. Poulson, Commonwealth's Attorney, Graham Nock (Knott), Commissioner of Revenue, and Martha B. Hundley, Treasurer; the motion for summary judgment on the cross-bill of complaint of the cross-defendants Board of Supervisors of Accomack County, Virginia, Jon C. Poulson, Commonwealth's Attorney, Graham Nock, Commissioner of Revenue, and Martha B. Hundley, Treasurer; the motion for summary judgment on the cross-bill of complaint of the cross-defendants Commonwealth of Virginia and Donald Haynes, State Librarian; the motion for summary judgment on the bill to quiet title of the complainant Commonwealth of Virginia, Etc.; and the order dismissing the original bill of complaint under the style "James M. Judge, Complainant v. Commonwealth of Virginia, Cross-Defendant" and further dismissing Jon C. Poulson, Commonwealth's Attorney, as a party to the said cross-bill of complaint; and was argued by counsel.

Whereupon, the Court proceeded to hear arguments on the aforesaid motions for summary judgment heretofore filed by all the parties to this suit.

UPON CONSIDERATION WHEREOF, the Court doth find that Chapter 510 of 1964 Acts of Assembly of the General Assembly of Virginia, Regular Session, was a gratuitous act on the part of the General Assembly of Virginia and that the passage of said Act did not convey or pass title to, or otherwise create any vested rights or interest in the real estate, the subject of said Act and this suit, in favor of the said Freida V. Judge and James

M. Judge, and that no actions were taken pursuant to said Chapter 510 to convey the title of the Commonwealth, and further that Chapter 18 of the 1964 Acts of Assembly, Special Session, was validly enacted into law with legal notice and was a valid exercise of the legislative power of the General Assembly of Virginia and effectively repealed the said Chapter 510 and that, accordingly, the said Freida V. Judge and/or James M. Judge cannot compel a conveyance of said real estate, it is accordingly

ADJUDGED, ORDERED and DECREED that partial summary judgment be and hereby is awarded the cross-defendants Commonwealth of Virginia, Donald Haynes, State Librarian, Board of Supervisors of Accomack County, Virginia, Graham Nock, Commissioner of Revenue, and Martha B. Hundley, Treasurer, as to Counts One and Two of the cross-bill of complaint; and it is further

ADJUDGED, ORDERED and DECREED that, with respect to the bill to quiet title filed by the Commonwealth of Virginia, Etc. to quiet title to said real estate in it, the respondent James M. Judge has not acquired title or vested rights or interest in said real estate by virtue of the passage of Chapter 510 and its effective repeal by Chapter 18 so as to constitute a defense to said bill, all in accordance with the Court's ruling on the cross-defendants' motions for summary judgment, and the Commonwealth's motion for summary judgment is granted to that extent; and it is further

ADJUDGED, ORDERED and DECREED that the respondent James M. Judge's motion for summary judgment on the ground that he acquired title to or vested rights in said real estate by virtue of Chapter 510 and that the subsequent repeal of Chapter 510 by Chapter 18 was null and void and that he is entitled to a conveyance of said real estate by the said Donald Haynes, State Librarian, be and hereby is denied, for the reasons more particularly set forth above;

AND PROCEEDING further, the Court directed counsel for the respective parties to file memoranda of law on the issue as to the applicability or nonapplicability and effect of *Va. Code Ann.* § 41.1-8 before further ruling on the respective motions for summary judgment, said motions of the respondent James M. Judge and the cross-defendants Board of Supervisors of Accomack County, Virginia, Graham Nock, Commissioner of Revenue, and Martha B. Hundley, Treasurer, being amended in open Court to include said ground;

UPON FURTHER CONSIDERATION WHEREOF, and after reviewing the joint brief filed on behalf of the complainant and the cross-defendants and the brief of the respondent, and after further review of the pleadings and other authorities, the Court doth find that, for the reasons set forth in the Court's written opinion filed in this cause, *Va. Code Ann.* § 41.1-8 is not applicable to this case; and it is accordingly

ADJUDGED, ORDERED and DECREED that the respondent James M. Judge's motion for summary judgment based on § 41.1-8 is denied; and it is further

ADJUDGED, ORDERED and DECREED that summary judgment be and hereby is awarded to the cross-defendants Commonwealth of Virginia, Donald Haynes, State Librarian, Board of Supervisors of Accomack County, Virginia, Graham Nock, Commissioner of Revenue, and Martha B. Hundley, Treasurer, as to Count Three of the cross-bill of complaint, and said cross-bill of complaint is hereby dismissed and judgment thereon entered in favor of said cross-defendants; and it is further

ADJUDGED, ORDERED and DECREED, in accordance with the Court's ruling above, that, with respect to the bill to quiet title filed by the Commonwealth of Virginia, Etc. to quiet title to said real estate in it, the respondent James M. Judge has not acquired the title,

ownership or right to said real estate by virtue of § 41.1-8 so as to constitute a defense to the complainant's bill to quiet title, and the Commonwealth's motion for summary judgment is granted to that extent.

And this cause is continued.

Enter this Decree this 9 day of May, 1985.

/s/ N. Wescott Jacob
Judge

Seen and objected to:

/s/ Richard R. Nageotte
Counsel for Respondent
and Cross-
Complainant,
James M. Judge

We ask for this:

/s/ John C. Poulson
Counsel for Complainant

/s/ John Morris III
Counsel for Cross-Defendants,
Commonwealth of Virginia and Donald Haynes,
State Librarian

/s/ Daniel Hartnett
Counsel for Cross-Defendants, Board of
Supervisors of Accomack County, Virginia,
Graham Nock, Commissioner of Revenue,
and Martha B. Hundley, Treasurer

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 83-490-N

JAMES M. JUDGE,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Defendants.

[Filed Jan. 7, 1986]

ORDER

This action was stayed on October 4, 1983 to permit a parallel state court action to dispose of unsettled issues of state law. The Circuit Court of Accomack County has rendered its decision in that case and this matter is now before the Court on the defendants' motion to dismiss. For the reasons articulated below, this Court grants the defendants' motion and ORDERS the complaint DISMISSED.

I.

In September of 1919, the General Assembly authorized the construction of a road across a body of water on the Easter Shore of Virginia known as Queen's Sound. Between 1939 and 1940 a new stretch of highway was constructed, changing the course of the original road and leaving a triangular piece of land in between. The plaintiff's predecessor began using this piece of land for his own commercial purposes during the 1930's. This

use continued for some decades and the plaintiff paid property taxes on the parcel of land.[1] In 1962, a storm damaged the property and its improvements. The plaintiff sought federal disaster relief from the Small Business Administration. At this time, he discovered that he had no title to the property.

On March 31, 1964, the Virginia General Assembly passed an act directing the state librarian to execute a quit-claim deed to the plaintiff for the contested property. The plaintiff never requested the deed from the librarian and none was ever executed. In December of the same year, the General Assembly became convinced that the act of March 31 was in contravention of state law and on December 12, 1964, repealed the first act.

The plaintiff claims in the case at bar that in repealing the act of March 31, the General Assembly deprived him of property, in violation of state law, without just compensation and without the due process the United States Constitution requires. The Commonwealth of Virginia filed a state court action to quiet title to this land, *Commonwealth of Virginia* v. *James M. Judge*, Chancery No. 7988, claiming that the Assembly's act of March 31 was *ultra vires* and therefore without legal effect and that the plaintiff was not deprived of any property interest by the repealing act of December 12.

Relying on *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), this Court abstained in the federal action to allow the Virginia courts to resolve a novel question of state law. The matter was, accordingly, stayed on October 4, 1983. Subsequently, the Circuit Court of Accomack County determined that quiet title to the property lay in the Commonwealth. Mr. Judge, the

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[1] It has long been held that one cannot acquire title to the Commonwealth's land by adverse possession. *Levasser* v. *Washburn*, 11 Gratt. (52 Va.) 572 (1854). The plaintiff does not challenge this rule of law.

plaintiff in the present action, is appealing this determination to the Virginia Supreme Court. The defendant's motion to dismiss is now ripe for consideration.

II.

"[A] litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims should not be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *England* v. *Louisiana State Bd. of Med. Exam.*, 375 U.S. 411, 415 (1964). The abstention doctrine is not an instrument designed to deprive a party of a federal forum for his federal claims, but is only a recognition that state courts should be the final expositors of state law. *Id.* The doctrine "does not . . . mean the abdication of federal jurisdiction, but only the postponement of its exercise." *Harrison* v. *NAACP*, 360 U.S. 167., 177 (1959).

The federal plaintiff, however, must choose which Court he wishes to render a decision on his federal claims. When the federal plaintiff seeks a binding determination of his federal claims in the state court, he may not later return to the Federal District Court to litigate these same issues. *NAACP* v. *Buttons*, 371 U.S. 415, 427-28 (1963).

In many instances, a state court will be unable to resolve the state law issues without being aware of the federal issues involved; statutes are frequently construed in such a manner as to avoid a constitutional defect. *See e.g. Government & Civic Employees Organizing Committee, C.I.O.* v. *Windsor*, 353 U.S. 364 (1975). Consequently, the federal plaintiff must be careful, in such cases, to articulate his federal claims without pursuing a state court resolution of them. In order to eliminate the possibility that he might inadvertantly lose his right to return to the federal courts, a litigant, under *England* may make a reservation of rights on the state court

record. "That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." *England*, 375 U.S. at 421.

III.

On September 6, 1985, this Court ordered the defendants to file certified copies of all pleadings and orders from the state court proceedings so that it could be determined whether the plaintiff had merely "exposed" his federal claims in that action or if, in fact, the state court had been urged to rule on these issues. This Court has reviewed these documents carefully and has found no indication that the plaintiff made any effort, expressed or otherwise, to reserve his right to return to this Court for determinations on his federal claims. Count One of Mr. Judge's cross-complaint in the state action alleges, *inter alia*, that "the action taken by the Legislature . . . violated the rights, privileges and immunities granted . . . by the Constitution of the United States of America in that it constituted a taking of . . . property without due process and just compensation." Cross-Complaint at ¶ 20, R. at 49. In his prayer for relief in his state court pleadings, the plaintiff requests

> (a) That this Court find and so Order, declaring that [the repealing act] is void ab initio as violating the rights privileges and immunities granted to your plaintiff . . . by the Constitution of the United States of America.

Such a prayer for relief is inconsistent with the reservation intended by *England*. Further, the unity of the claims in the two suits is borne out in correspondence submitted to the Court by the plaintiff in lieu of a brief on January 7, 1985. Consequently, this Court has no

alternative but to DISMISS the plaintiff's complaint. The only federal judicial remedy open to the plaintiff is to appeal to the United States Supreme Court any adverse determination the state's highest court may make.

IT IS SO ORDERED.

/s/ Robert G. Doumar
United States District Judge

At Norfolk, Virginia
January 7th, 1986

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

Record No. 850657
Circuit Court Chancery No. 7988

JAMES M. JUDGE,

Appellant

v.

COMMONWEALTH OF VIRGINIA, *et als.*

Appellees

[Filed May 30, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James M. Judge, the Cross-Complainant/Appellant above named, hereby appeals to the Supreme Court of the United States from the Final Decree of the Circuit Court of Accomack County entered on the 23rd day of May, 1985 and the Decree denying appellant's constitutional claims entered by the Circuit Court of Accomack County, Virginia on the 9th day of May, 1985 and the Final Order of the Supreme Court of Virginia entered on the 3rd day of March, 1986 denying appellant's Petition for Appeal.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, (2) and (3).

Dated this 29th day of May, 1986.

/s/ James M. Judge
JAMES M. JUDGE
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Appellant
(703) 491-4136

VIRGINIA:

IN THE CIRCUIT COURT OF ACCOMACK COUNTY

Chancery No. 7988

COMMONWEALTH OF VIRGINIA, and
its agencies as their interest may appear,
Complaints

v.

JAMES M. JUDGE, *et als.*,
Respondent

and

JAMES M. JUDGE,
Cross Complainant

v.

COMMONWEALTH OF VIRGINIA, *et als.*,
Cross Defendants

[Filed May 30, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James M. Judge, the Cross-Complainant/Appellant above named, hereby appeals to the Supreme Court of the United States from the Final Decree of the Circuit Court of Accomack County entered on the 23rd day of May, 1985 and the Decree denying appellant's constitutional claims entered by the Circuit Court of Accomack County, Virginia on the 9th day of

May, 1985 and the Final Order of the Supreme Court of Virginia entered on the 3rd day of March, 1986 denying appellant's Petition for Appeal.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, (2) and (3).

Dated this 29th day of May, 1986.

/s/ James M. Judge
JAMES M. JUDGE
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Appellant
(703) 491-4136

CHAPTER 510

An Act for the relief of Freida V. Judge and James M. Judge.

[H 535]

Approved March 31, 1964

Whereas, in or about the year 1925, a highway was constructed as an approach to a bridge in the county of Accomack; and

Whereas, as a result of the construction of the highway, land fill built up and created new land abutting that of the then owner of such abutting land; and

Whereas, through various mesne conveyances, the land is now held by Freida V. Judge and James M. Judge; and

Whereas, taxes have been paid upon the whole of said land by members of the Judge family for a period of more than twenty years, and this family has held the whole of said property to the exclusion of any other claimant thereto for more than twenty years; and

Whereas, there is no one but the Commonwealth of Virginia except the said Judges who could have any interest in the said land; and

Whereas, chapter 5 of Title 41 of the Code of Virginia provided a remedy in such cases, but this chapter has been repealed, and no remedy at law or equity exists whereby Freida V. Judge and James M. Judge might have recourse; now, therefore

Be it enacted by the General Assembly of Virginia:

1. § 1. Notwithstanding the provisions of § 41-1 of the Code of Virginia, the State Librarian is authorized and directed to convey by quit claim deed to Freida V. Judge, widow and James M. Judge, unmarried, all right, title and interest of the Commonwealth of Virginia in and to the following real estate:

All that certain lot or parcel of land situate in Atlantic Magisterial District, Accomack County, Virginia, along the south side of the public highway known as the "causeway" leading from the mainland to Chincoteague Island, containing one and one-half acres, more or less, but same is conveyed in gross and not by the acre, and bounded on the north by the said "causeway"; on the east by Queen Sound Channel; and on the south and west by Shell Bay; and being the same real estate conveyed to James M. Judge and Freida V. Judge by Harry G. Judge, et ux., et als., by deed dated July 3, 1962, and recorded in the clerk's office of Accomack County, Virginia, on July 19, 1962 as deed number 75162.

Such deed shall be in a form approved by the Attorney General.

CHAPTER 18

An Act to repeal Chapter 510 of the Acts of Assembly of 1964, being an act for the relief of Freida V. Judge and James M. Judge.

[H 15]

Approved December 12, 1964

Be it enacted by the General Assembly of Virginia:

1. Chapter 510 of the Acts of Assembly of 1964 is repealed.

2. An emergency exists and this act is in force from its passage.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.